No. 80-2078

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Before Judgment

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REPLY BRIEF FOR PETITIONER

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New York Times, Dec. 22, 1980 17

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REPLY BRIEF FOR PETITIONER

The issue in this case is whether the President can unilaterally terminate pending lawsuits, nullify attachments, liens and judgments of Article III courts, override an act of Congress, and permanently transfer property securing claims of United States creditors to the foreign debtor. The Government and other Respondents argue that the President has simply "settled Petitioner's claim by moving it from federal court to foreign arbitration."[1] This "settlement," the Government says, frees Petitioner "from the vagaries and hazards of domestic litigation against a foreign sovereign . . . ." Gov't Br. at 7. Petitioner has already overcome these

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[1] Respondents also contend that the President merely prescribed a new substantive rule of law that must be applied by domestic courts. This argument "begs the question of the power to prescribe such a new rule of law which has the undeniable effect of negating valid exercises of this Court's jurisdiction." *Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F, slip op. at 22-23 (N.D. Tex., June 7, 1981).

purported "vagaries and hazards" in its Underlying Action, however, by obtaining prejudgment attachments and a final judgment against Iran and the AEOI.[2] No gloss by the Government can obscure the simple fact that Petitioner has been deprived of its otherwise enforceable statutory rights and judgment by the unauthorized action of the President.[3]

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[2] The Government and other Respondents also create a false picture of the record in this case by making unfounded assertions about Petitioner's Underlying Action, the merits of which are not properly before this Court. Thus, while conceding that Petitioner's case is typical (Gov't Br. at 3 n.2, 4 n.5), the Government obliquely questions Petitioner's judgment and prejudgment attachments in the Underlying Action. Gov't Br. at 26 n.19, 55 n.52. Similar collateral attacks are made by Intervenor Atomic Energy Organization of Iran ("AEOI") and Amicus Curiae 26 Iranian Banks. These attacks, containing several affirmative misrepresentations, are procedurally improper and wrong in any event. The Government raised no such factual questions below, but filed a motion to dismiss under Rule 12(b)(6); it and the other Respondents are precluded from raising here questions concerning the validity of the district court's orders. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972).

[3] Nothing cited by the Government or any other Respondent authorizes the President to nullify a judgment of an Article III court, but the Algerian Declarations purport to do just that: "the United States agrees . . . to nullify all attachments and judgments . . . ." Pet. App. 22. The President's action interferes with the constitutional authority of Congress to confer jurisdiction and of the Judiciary to adjudicate disputes. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). The lower courts have noted the serious "separation of powers problems raised by an Executive effort to affect the outcome of a pending case." *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1891, slip op. at 35 (D.C. Cir., May 22, 1981); *National Airmotive Corp. v. Iran*, 499 F. Supp. 401, 405 n.8 (D.D.C. 1980); *see Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218F (N.D. Tex., June 7, 1981); *Marschalk Co. v. Iran National Airlines Corp.*, 79 Civ. 7035 (CBM), slip op. at 56-57 (S.D.N.Y., June 11, 1981).

I. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT DOES NOT AUTHORIZE THE PRESIDENT PERMANENTLY TO DISPOSE OF FOREIGN ASSETS.

Petitioner agrees with the Government that insofar as the President purports to nullify Petitioner's judgment and attachment liens and to order the "transfer" of attached property to Iran, the "issue is the extent and nature of the powers the President possesses under IEEPA . . . ." Gov't Br. at 21. Petitioner contends that the President's action, which orders the permanent disposition of the property and the evasion of statutory rights of American creditors, exceeds his authority under IEEPA. Pet. Br. at 27-31. The Government does not recognize any limitations on IEEPA's freeze authority and simply argues in a variety of ways that the "plain language" of Section 1702 authorizes the President to "compel" the "transfer" of foreign assets. That limitless reading of Section 1702's language transforms a statute enacted expressly to curb presidential power into one that drastically enlarges it.

A. IEEPA Does Not Give the President "Plenary Control" Over Frozen Assets.

The Government concedes IEEPA was enacted to restrict presidential control over foreign property by "deliberately with[holding] from the President" the authority to vest assets. Gov't Br. at 38. Under TWEA that vesting power was the sole source of presidential authority permanently to dispose of foreign property. 50 U.S.C. App. § 5(b). The authority IEEPA preserves —the power temporarily to freeze or block transactions in property—does not authorize a permanent disposition.[4] Congress clearly reaffirmed the distinction between the

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[4] Congress itself recognized the freeze power does not include the power to dispose permanently when it amended TWEA to add the vesting power. *See Clark v. Uebersee Finanz Korp.*, 332 U.S. 480, 487 (1947); *Tagle v. Regan*, 643 F.2d 1058, 1066 (5th Cir. 1981); Pet. Br. at 25 n.25.

prohibitory power to freeze and the affirmative power permanently to dispose by vesting when it adopted IEEPA.[5] The Government, however, simply refers to the "plain language" of IEEPA (Gov't Br. at 19), characterizes the President's authority as including the "disposition of foreign assets" (*id.* at 15, 30), and makes sweeping—and unsupported—assertions that the President's statutory control over foreign property is "plenary" (*id.* at 24, 35) and "complete" (*id.* at 30).[6]

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[5] For example, Congressman Solarz asked Congressman Bingham, the chairman of the subcommittee that reported the House version of IEEPA, to explain the extent of the President's power under IEEPA if, in response to a new Arab oil boycott, the President declared a national emergency:

> Mr. Solarz. . . . When [IEEPA] talks about regulating the controlling foreign assets, does that mean he could freeze the assets of the boycott of the country that established the embargo?
>
> Mr. Bingham. Correct, *freeze but not seize. There is a difference.*

(Emphasis added.) Revision of Trading with the Enemy Act: Markup Before the House Comm. on International Relations, 95th Cong., 1st Sess. 4 (1977) (*"IEEPA House Markup"*) (emphasis added). *See also Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economics Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 108 (1977) (*"IEEPA House Hearings"*) (Justice Department representative: authority "merely [to prohibit] any transfer without a license . . .").

The authorities relied on by the Government also show that the power conferred by § 1702(a) is limited to the freezing or "immobilization" of foreign assets. *Propper v. Clark*, 337 U.S. 472, 484 (1949); *Markham v. Cabell*, 326 U.S. 404, 409 (1945).

[6] The Government claims that under IEEPA, the President can "maintain the foreign assets at his disposal, unfettered to the degree he deems advisable, for use in negotiating a resolution of the national emergency that gave rise to the blocking order." Gov't Br. at 28. For example, under the Government's construction of IEEPA and the Iranian precedent here, the President could declare an emergency, freeze all property in the United States in which Israel and its nationals have "any interest," shield it from judicial processes and the right of all Americans also possessing an "inter-

The Government also contends that Petitioner's statutory right to attach Iranian property was subject to regulation under IEEPA. Gov't Br. at 31-36. *But see* Pet. Br. at 29-30 & n.29. Thus, the Government argues that under *Orvis* v. *Brownell*, 345 U.S. 189 (1953), and *Zittman* v. *McGrath*, 341 U.S. 446 (1951), Petitioner secured by its attachment liens against the frozen assets only Iran's "contingent" interest in the property: "Under the Iranian regulations, the transfer of or creation of a legally enforceable interest in frozen property pursuant to court order is treated in the same manner as a voluntary transfer by Iran . . . ." Gov't Br. at 35.

Petitioner vigorously disputes the Government's characterizations of its attachments as "contingent." *See* Section III *infra*. Even were the Government's contentions correct, however, they do not establish that the President's authority under IEEPA to freeze assets includes the authority to order their permanent disposition. In terms of *Orvis* and the Government's theory, the only "contingency" to which the Iran assets were subject under IEEPA was the duration of the freeze. Unlike assets frozen under TWEA and cases decided thereunder such as *Orvis*, Iran's interest was not subject to the additional contingency that the property might be vested and permanently disposed of "in the interests of and for the benefit of the United States." 50 U.S.C. App. § 5(b)(1). As the Government says, Petitioner secured by its liens all that Iran could voluntarily give away. Since IEEPA withdrew the President's former authority permanently to dispose of frozen property, he is not authorized to give the property back.

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est" in that property, and order it "transferred" to a Middle-Eastern Tribunal empowered to "arbitrate" Iraqi claims arising out of the recent destruction of Iraq's nuclear reactor.

B. IEEPA's Provision for the Continuation of Freezing Controls in the Presence of Outstanding American Claims Does Not Authorize Presidential Orders Permanently Abrogating Existing Statutory Rights of Claimants.

Remarkably, the Government contends that the President's permanent abrogation of the rights of American creditors finds support in IEEPA's provision "for continuation of freezing controls even after the termination of a national emergency where necessary because of outstanding claims." Gov't Br. at 29; *see* 50 U.S.C. § 1706 (a). In fact, however, Section 1706(a) adds yet further support to the historical understanding that the power to freeze is the power temporarily to immobilize and not the power to dispose—it characterizes the President's authority under Section 1702 as that of "*prohibit*[*ing*] *transactions* involving [foreign] property" and authorizes the "*continuation of such prohibition* . . . [if] necessary on account of claims involving such country or its nationals." [7]

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[7] 50 U.S.C. § 1706(a)(1), (2) (emphasis added). *See* note 5 *supra*. In none of the Executive settlement agreements involving countries whose assets were frozen including those cited by the Government (Gov't Br. at 46 n.39), did the President do any more than promise to unfreeze the blocked property. *See* Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306; Agreement Regarding the Settlement of Claims, March 6, 1973, United States-Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569; Agreement Regarding Claims of United States Nationals, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5389; Agreement Regarding Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Agreement Relating to Financial Questions, March 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451; Agreement Regarding Pecuniary Claims of the United States and its Nationals, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803. The President has never ordered those unfrozen assets to be "transferred" to the foreign government following "settlement." *See* 45 Fed. Reg. 224 (1980) (China); 38 Fed. Reg. 7894-95 (1973) (Hungary); 28 Fed. Reg. 7935 (1963) (Bulgaria); 25 Fed. Reg. 7240 (1960) (Poland); 25 Fed. Reg. 3458 (1959) (Rumania).

Moreover, the Government's reference to Section 1706 (a) is particularly inappropriate in the context of Petitioner's claims. Section 1706(a) was added principally so that the President could continue an asset freeze without making a new, potentially embarrassing, declaration of a national emergency and because the State and Justice Departments were concerned that under IEEPA's definition of "emergency" the President could not lawfully characterize the state of affairs with several of the countries whose assets were then frozen as an "emergency." *See, e.g., IEEPA House Hearings* at 182-83, 209-10. In these circumstances, the President could not, without Section 1706(a), continue the asset freeze, and as a result his bargaining power to negotiate the settlement of *expropriation* claims of United States citizens against foreign governments—for which recovery by the United States claimants, without Executive intervention, is still almost entirely unavailable under FSIA—would be severely compromised.[8]

In contrast, Petitioner's commercial claim is cognizable in the United States courts under FSIA, and there is no indication whatever in the statute or its legislative history that IEEPA's freezing controls were intended to be used to prejudice the existing rights of American claimants.[9] Ironically, the loss of Petitioner's attached assets under the presidential orders at issue is just what was feared would happen to creditors without effective

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[8] *See IEEPA House Hearings* at 217-18; H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 6 (1977) (*"IEEPA House Report"*); *Amending the Trading with the Enemy Act: Hearing on H.R. 7738 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 6, 15-17 (1977) (*"IEEPA Senate Hearing"*); *IEEPA House Markup* at 6.

[9] "It is the intent of the committee by this section to enable the timely termination of states of emergency, and a return to government under normal law, without prejudicing the ability of U.S. citizens to recover claims against foreign countries."

IEEPA House Report at 17; *see IEEPA House Hearings* at 217-18.

judicial remedies if Section 1706(a) were not included in IEEPA. As the Treasury Department's representative testified, "loss of control of these [frozen] assets would deprive American claimants against these countries of the security afforded for their private claims by this collateral." *IEEPA House Hearings* at 108.

C. The "Transfer" Order Here Would Be Unlawful Under TWEA as an Evasion of the Statutory Protections Provided for American Creditors.

The Government apparently concedes that the President's freeze authority under IEEPA is no greater than his analogous authority under TWEA (Gov't Br. at 30-31) and that, when foreign property is vested by the President under TWEA, American creditors of the foreign debtor are *entitled* by statute to have their claims paid out of the assets or their proceeds (*id.* at 37-38). Nonetheless, the Government insists that a transfer order that circumvents the rights of American creditors would have been lawful under TWEA. The Government has cited *no* case or other authority, and Petitioner is aware of none, in which any President *ever* employed TWEA's freeze authority to "compel . . . any . . . transfer . . . of . . . any [foreign] property" in a way even remotely analogous to the "transfer" ordered here.[10] To do so, Petitioner submits, would be unlawful under TWEA as a permanent disposition of property in derogation of the statute's protections of the interests of American creditors. 50 U.S.C. App. §§ 9, 34. If, under TWEA, the President could not order a permanent transfer of assets

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[10] The language of Section 1702(a) can be spliced together in nearly 100 different ways, resulting in literal language that ostensibly grants virtually limitless presidential power. For example, under the construction advanced in support of the President's power here—"direct and compel . . . any . . . transfer . . . of . . . any property in which [Iran] . . . has any interest"—the President could order that title to a home owned by an American and subject to a mortgage from an Iranian bank be "transferred" anywhere, or to anyone, or, to pick another of section 1702(a)'s terms, simply "nullif[ied]."

[Footnote continued on page 9]

in derogation of the rights of American creditors, he certainly cannot do so under the lesser authority conferred by IEEPA.

II. THE PRESIDENT DOES NOT HAVE STATUTORY OR INHERENT CONSTITUTIONAL AUTHORITY TO NULLIFY PETITIONER'S RIGHTS.

A. The President's Actions Conflict Directly With FSIA.

The Government erroneously contends FSIA does not limit the Executive's alleged inherent authority to settle American citizens' commercial claims against foreign states. First, the Government attempts to separate Executive settlement of such claims from the doctrine of sovereign immunity. Gov't Br. at 63. In *Ex Parte Peru*, 318 U.S. 578 (1943), however, this Court recognized the direct link between the two. Enforcing the now abandoned absolute theory of sovereign immunity, the Court observed that the doctrine

> involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of foreign affairs by the President and by the Department of State . . . .

Id. at 587 (Stone, C.J.).[11]

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[10] [Continued]

Limiting the scope of IEEPA authority to the temporary control of foreign property does not render the "transfer" power meaningless. Under his freeze authority the President could, for example, order that blocked demand deposits be transferred to an interest-bearing account, *Iranian Asset Settlement: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 102-103 (1981), or safeguard frozen foreign property in the physical possession of foreign nationals or agents of the foreign government by ordering it transferred to the custody of another for the duration of the freeze.

[11] The Government's alleged distinction also ignores the stated purpose of FSIA to remove Executive control over commercial suits against foreign states. *See* Pet. Br. at 9-16. Moreover, if the

Second, the Government contends that the Executive's settlement power "does not expand or contract depending upon the availability of private remedies to individual claimants." Gov't Br. at 58. The Government's position is refuted by FSIA and its legislative history. Moreover, it is inconsistent with statements of Executive representatives during the House Committee Hearings on FSIA acknowledging Congress' authority to regulate in this field,[12] even to the complete exclusion of the Executive.[13]

Government were correct, FSIA—like the Tate letter—would become an "empty gesture," *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 45 (1973) (*"1973 House Comm. Hearings"*); commercial claims against foreign states would continue to be compromised by Executive intervention under the guise of a "settlement" rather than a suggestion of immunity.

[12] *1973 House Comm. Hearings* at 30 (testimony of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice, responding to question on removal of FSIA claims: "[*W*]*e feel and we are convinced that the Congress has absolute authority to legislate in this area*" (emphasis added).) Intervenor Bank Markazi's quotation from the legislative history regarding Executive espousal of claims is taken out of context. Markazi Br. at 29-30. In context, Mr. Brower's statement simply acknowledged that if the new FSIA remedy proved inadequate, the State Department would remain willing to espouse a citizen's claim through diplomatic channels. *See 1973 House Comm. Hearings* at 23-26.

[13] *1973 House Comm. Hearings* at 30. (Mr. Ristau, responding to question concerning FSIA cases during periods of strained diplomatic relations, stated: "Ideally, Congressmen, it shouldn't have any impact, but rather a dispute arising out of a commercial activity ought to be divorced from any diplomatic overtones whatsoever *and should be settled through the ordinary processes of law*. A dispute between a painting contractor, to use your own example, and the Government *should in no way be affected by whatever the state of diplomatic relations at any given moment might be. It should be totally divorced*" (emphasis added).) *Cf.* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L. J. 1009, 1063 (1979) ("Assume American hostages are being held by a foreign govern-

Finally, there is no merit to the Government's suggestion that contemporaneous or post-FSIA congressional action refutes Petitioner's contention that FSIA removed Executive authority over commercial claims. The Government cites three actual or contemplated settlements concerning expropriation or nationalization claims,[22] which pursuant to congressional authorization will be or have been adjudicated by the Foreign Claims Settlement Commission.[14] None of these supports the Government's contention that Congress, through the provision of mechanisms to satisfy long-outstanding expropriation claims, similarly intended that Petitioner's presently enforceable contract claim under FSIA would be subject to settlement by the Executive.[15]

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ment. While negotiating for their release, the United States Government wishes to offer as a quid pro quo the termination of pending litigation against that nation within this country. *Under the FSIA, the Exective would have no such authority*, similarly, the judiciary probably cannot dismiss the actions if the jurisdictional criteria of the Act [are] satisfied" (emphasis added).) *See also* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 65 (1978).

[14] (1) Claims against the German Democratic Republic (regarding nationalizations), *Status of Claims Settlements with Nonmarket Countries:Hearings on East German Claims Bill H.R. 14642 Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess. 1, 38 (1976); (2) pre-settlement adjudication of claims against China for "nationalization, expropriation, intervention, or other taking of, or special measures directed against property" which process was completed by the Foreign Claims Settlement Commission in 1972, *id.* at 8, 9; and (3) pre-settlement adjudication of claims arising out of North Vietnam's nationalization and expropriation of U.S. nationals' property, *Adjudication of Claims Against Vietnam: Hearing and Markup on H.R. 2200 Before the Subcomm. on Asian and Pacific Affairs and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 1, 2 (1979).

[15] In referring to the Congressional hearings on the Algerian Declarations, both the Government (Gov't Br. at 55) and Intervenor Bank Markazi (Markazi Br. at App. B-23 through B-25)

B. The President's Action Is Not Supported By Historical Practice or Judicial Precedent.

The Government, pointing to "a long-standing practice" (Gov't Br. at 41), asserts the President has broad, perhaps unlimited, inherent authority to settle citizens' claims against foreign states. It relies in large part on the propositions, drawn from pre-FSIA authorities, that

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take great solace from the fact that Congress has not directly expressed, in pending bills or legislation, its dissatisfaction with the Algerian Declarations. However, Congress, like the present Administration (Pet. Br. at 21 n.20), has expressed concern over the validity of the agreements and, quite properly, is awaiting the final judicial decision of this issue. *See Iranian Asset Settlement: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 3, 4 (1981).

The Government also cites two congressional hearings—*Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) ("*Separation of Powers Hearings*") and *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976) ("*International Security Hearings*")—to convey the erroneous impression that Congress has fully acquiesced in Executive claims settlement agreements. If anything, these hearings, prompted by the secret aid agreement made between President Nixon and President Thieu, *see, e.g., International Security Hearings* at 96; *Separation of Powers Hearings* at 3, indicate serious concerns regarding the source and scope of the Executive's inherent constitutional authority to enter into Executive agreements on issues of major concern to the country.

For instance, during the hearings Congress and various scholars repeatedly questioned the scope of inherent Executive authority to enter into various agreements and the contention that such inherent power had been validated by *Pink, Belmont* and *Curtiss-Wright. See, e.g., International Security Hearings* at 38-39, 69-70, 73, 269. Apparently the Executive representatives attempted to placate congressional concerns regarding the use of Executive agreements by explaining that some 97-98% of all such agreements were entered into, not on the sole authority of the Executive, but rather pursuant to treaty or statutory directive or subject to subsequent congressional approval. *See, e.g., id.* at 170, 213; *Separation of Powers Hearings* at 306-07.

claims of United States citizens against foreign states are in essence claims of the United States which the Executive may dispose of as it chooses and that the Executive may make its settlement of claims the exclusive remedy of the claimant, extinguishing any recourse under domestic law which the claimant might otherwise have. That argument, however, arises out of the pre-FSIA reality that "[a]bsent a diplomatic initiative on the part of the private claimant's government, generally these claims have gone begging." I R. Lillich & B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* 10 (1975). FSIA renders the Government's authorities irrelevant.

The Government also relies in large part on cases which involve Executive action in conjunction with congressional authorization—either by treaty or by act of Congress.[16] These cases have no bearing on the President's inherent authority to settle claims by Executive agreement. Finally, many of the Executive agreements the Government cites were not concluded pursuant to the President's inherent power to settle claims, but rather rest on at least implicit congressional authorization, pursuant to the statutory framework of the International Claims Settlement Act, 22 U.S.C. §§ 1621, *et seq.*[17]

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[16] Some of the Government's and Bank Markazi's cases do not involve the Executive's power to enter into international agreements at all. Of those that do, all but three involve a treaty, not an Executive agreement. Two of these exceptions, *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), are discussed in Petitioner's Brief at 19-20. The third, *Ozanic v. United States*, 188 F.2d 288 (2d Cir. 1951), involved an Executive agreement authorized by an act of Congress. The language in *Ozanic* relied on by the Government (Gov't Br. at 45) and Bank Markazi (Markazi Br. at 17, 25) is dicta.

[17] *See* Agreements with China, Hungary, Bulgaria, Poland and Rumania cited in full at note 7 *supra*. In addition, the Agreement Regarding Pecuniary Claims of the United States and its Nationals, July 19, 1948, United States-Yugoslavia, 62 Stat.

Petitioner is aware of no Executive agreement prior to 1977 that purports to affect pending claims in United States courts. The provisions of the two Executive agreements settling claims which have been concluded *after* the effective date of FSIA certainly do not.[18] Nor does the Litvinov Assignment—which Intervenor Bank Markazi claims is just like the agreement at issue in this case (Markazi Br. at 24)—advance the Government's argument. Not only was that agreement sanctioned by Congress,[19] it essentially waived claims of the Soviet Union against American nationals and assigned nationalized Soviet assets in the United States to the government to satisfy the claims of American nationals against the Soviet Union. *See United States v. Pink*, 315 U.S. 203, 225, 227-28 (1942). Indeed, in both *Pink*, *id.* at 226-27, and *United States v. Belmont*, 301 U.S. 324, 331-32 (1937), the Court noted it did not have before it any claims by United States citizens that their rights as creditors had been prejudiced by the Assignment. In *Pink*, the Court specifically stated that as far as it could

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2658, T.I.A.S. No. 1803, was explicitly recognized by the Act, and the Agreement Regarding Claims of United States Nationals, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545, is anticipated in its legislative history. *See* H.R. Rep. No. 770, 81st Cong., 1st Sess.

[18] Agreement Concerning the Settlement of Claims, May 19, 1979, United States-Egypt, T.I.A.S. No. 9589; Agreement Concerning the Settlement of Claims, May 11, 1979, United States-China, 30 U.S.T. 1957, T.I.A.S. No. 9306. The China agreement settled expropriation claims that could not be successfully prosecuted in the United States in any event because of the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). Moreover, under FSIA, relief for expropriation or nationalization claimants is tightly circumscribed. *See* FSIA Section 1605(a)(3); FSIA House Report, U.S. Code Cong. & Ad. News at 6618-19 & n.1.

[19] Joint Resolution of August 4, 1939, 53 Stat. 1199; H.R. Rep. No. 865, 76th Cong., 1st Sess. (1939); *see United States v. Pink*, 315 U.S. 203, 228 (1942).

determine from the record, U.S. citizen creditors had *not* been adversely affected, but rather had "been paid." 315 U.S. at 226-27.[20]

To uphold the President's action in this case, this Court would have to rule for the first time that the President has inherent authority, without congressional approval, to enter into Executive agreements which deprive United States citizens of rights expressly granted them by congressional statute. However, Executive agreements made without congressional sanction, not pursuant to a treaty or act of Congress, simply cannot supersede inconsistent provisions of prior acts of Congress. *United States v. Guy W. Capps, Inc.*, 204 F.2d 665, 659-60 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Restatement (Second) of Foreign Relations Law of the United States*, § 144(1)(b) (1965); *see Seery v. United States*, 127 F. Supp. 601, 607 (Ct. Cl. 1955).

The Executive has previously so acknowledged.[21] In 1958, for example, the State Department determined

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[20] Bank Markazi erroneously argues that the distinction in *Pink* between U.S. and foreign creditors is "meaningless." (Markazi Br. at 24). As observed in *United States v. Ehrlichman*, 376 F. Supp. 29, 33 n.4 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977): "None of these cases [*Pink*, *Belmont* and *Curtiss-Wright*] purport to deal with the constitutional right of American citizens or with presidential action in defiance of congressional legislation. When such issues have arisen, Executive assertions of inherent authority have been soundly rejected." (Citations omitted.)

[21] *See* 14 M. Whiteman, *Digest of International Law* 207 (1970) (Acting State Department Legal Advisor: "[w]hile the line of demarcation is not always wholly clear, legislation is necessary where the United States is required under the [Executive] agreement to take actions not consistent with existing statutes"); *Separation of Powers Hearings*, *supra* note 15, at 307.

that the President did not have the power to enter into an Executive agreement with Norway "which would in effect take jurisdiction of [a claim of Christopher Hannevig against the United States] from the Court of Claims and place it in an international arbitral tribunal." 14 M. Whiteman, *Digest of International Law* 248 (1970). The claim had been referred to the Court of Claims pursuant to a convention ratified by the Senate and by a joint congressional resolution. The State Department concluded the President did not have the power to submit the claim to international arbitration without congressional approval. *Id.* at 250.[22]

III. EVEN IF AUTHORIZED, THE PRESIDENT'S ACTION CONSTITUTES A TAKING OF PROPERTY WITHOUT JUST COMPENTATION.

The Government contends that Petitioner's attachments are not compensable property interests for Fifth Amendment purposes because they "were obtained as a result of a license that was expressly made revocable at any

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[22] In a futile search for *statutory* authority to settle claims, the Government continues to misread both IEEPA and 22 U.S.C. § 1732 (Gov't Br. at 52-53), neither of which can fairly be read to support the Government. *See* Pet. Br. at 17 n.17. Also, the Government now adds to its list the Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853. While the Treaty does indeed provide for resolution of the "interpretation or application" of the Treaty by "pacific" means, the underlying claim here is a breach of contract action—it does not involve an interpretation or application of the Treaty, and presidential authority to find a pacific settlement does not arise. Further, the Treaty itself clearly contemplates under Article XI(4) that creditors will bring such contract suits by providing that neither party shall enjoy immunity from "suit" over business activities, and under Article IV(1) that "lawful contract rights are afforded effective means of enforcement, in conformity with the applicable laws."

time." Gov't Br. at 64.[23] However, the Treasury Regulations issued to freeze Iranian assets in November 1979 (the "Freeze Regulations") purported to make revocable only the authorizations to obtain new attachments, not attachments acquired pursuant to that revocable authorization. *See* Pet. Br. at 36-40.[24] The Government cites no authority for the principle that confiscation of property interests obtained under a revocable license can be achieved without paying just compensation. Cases such as *United States v. Fuller*, 409 U.S. 488 (1973), and *Acton v. United States*, 401 F.2d 896 (9th Cir. 1968), *cert. denied*, 395 U.S. 945 (1969), hold no more than that withdrawal of the revocable license itself does not constitute a taking.

Further, as the District Court for the Southern District of New York explicitly recognized, those who obtained attachments pursuant to the Government's authorization believed they were acquiring valuable interests and that

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[23] As to the taking of Petitioner's judgment, the Government simply—but erroneously—asserts it was improperly entered. Gov't Br. at 55, 64-66. The relevant regulations merely prohibit the entry of a judgment "with respect to any property in which . . . there existed an interest of Iran." 31 C.F.R. §§ 535.203(e), 535.504. Petitioner has no such judgment. Its judgment adjudicated questions related to liability, liquidated the amount of Petitioner's claims and provided a basis for any future attempt to levy on Iranian assets; it did not create an interest in any property under California law. Cal. Civ. Proc. Code § 674(a). This construction of the regulations is consistent with the language of IEEPA. *See American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779, slip op. at 27-28 n.15 (D.C. Cir., May 22, 1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027, slip op. at 14-14A n.13 (1st Cir., May 22, 1981).

[24] Prior to the Algerian Declarations, the government itself acknowledged that the attachments had ongoing validity by repeatedly indicating that the legal problems arising from attachments by United States creditors might impede returning the assets to Iran in exchange for the hostages. *See* N.Y. Times, Dec. 22, 1980, at A-1, A-13, col. 1; *id.*, Nov. 3, 1980, at A-1, A-15, col. 2; Wall St. J., Nov. 3, 1980, at A-3, col. 2.

"by relying on the government's action, [they] would not thereafter have [their] rights to the attachment nullified by another government action." *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM), slip op. at 81 (S.D.N.Y., June 11, 1981). Expectations so engendered are relevant to whether property rights exist and have been taken unconstitutionally, *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), and distinguish the cases relied on by the Government. Unlike the situation in *Orvis v. Brownell*, 345 U.S. 183, 187 (1953), it was not "apparent on its face" in 1979 that the attachments of American creditors were something less than protected property interests. Similarly, *United States v. Fuller*, 409 U.S. at 489, *Newport & Cincinnati Bridge Co. v. United States*, 105 U.S. (15 Otto) 470, 482 (1881), and *Acton v. United States*, 401 F.2d at 899, are all predicated on the foreseeability and voluntary acceptance of the risk of loss caused by future government actions.

The Government also contends that Petitioner's attachments have not been "taken" because they were merely "conditional" attachments, subject at all times to the President's "paramount and previously acquired power to direct the transfer of the property pursuant to IEEPA." Gov't Br. at 64. For this theory of conditional attachments to be correct, however, IEEPA would have to be interpreted not only to authorize the President to transfer Iranian assets, but also to empower the President to transfer them without payment of compensation to those whose rights have been impaired. This interpretation of IEEPA would ignore this Court's consistent view that the power granted the Executive by Congress to block and appropriate non-enemy property interests would be of doubtful constitutionality if the grant of power was not interpreted to provide for the payment of just compensation for property taken. *See Cities Service Co. v. McGrath*, 342 U.S.

330 (1952); *Guessefeldt v. McGrath*, 342 U.S. 308, 317-18 (1952); *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79-80 (1935).

Moreover, the government explicitly authorized unconditional attachments of Iranian assets in the Freeze Regulations. The government never suggested that such attachments were somehow conditioned on the President's alleged plenary power to transfer the assets; thus the government is now estopped from denying the interests its own regulatory scheme created. *See Zittman v McGrath*, 341 U.S. 446, 452-53 (1951).[25]

The taking of Petitioner's attachments, judgment and judgment liens is plainly ripe for decision.[26] *See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir., May 22, 1981); *American Int'l Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir., May 22, 1981). There can be no doubt that the taking of these property interests has already occurred.

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[25] Even assuming that Petitioner's liens were "contingent" on the President's alleged transfer power, these liens are valuable property rights. But for the President's actions, Petitioner would have the opportunity to enforce the liens against attached assets that (1) do not leave the United States (*e.g.*, physically immovable assets such as houses (*see* App. 19-20)); (2) return to the United States; or (3) move to a foreign jurisdiction that would recognize the liens. Even *Zittman* and *Orvis* recognize that a creditor's attachment lien is good as against the debtor's interest in the property attached. *Zittman v. McGrath*, 341 U.S. 446, 455-63 (1951); *Orvis v. Brownell*, 345 U.S. 183, 186 (1953).

[26] As to Petitioner's *claims*, the Government argues there could be no "taking" whether or not the claims are found to be within the jurisdiction of the Arbitral Tribunal. Gov't Br. at 65. Both the First Circuit and the D.C. Circuit correctly rejected this view. *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, slip op. at 23; *American Int'l Group, Inc. v. Islamic Republic of Iran*, slip op. at 40.

CONCLUSION

For the reasons stated, the Order of the District Court should be reversed.

Dated: June 23, 1981.

Respectfully submitted,

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